

SOUTH AFRICA / JUDGMENT

Mokgothu and Another v The State (A20/2018) [2018] ZAFSHC 140 (27 September 2018)

[2018] ZAFSHC 140**COURT**

Free State High Court, Bloemfontein

BEFORE

Daffue, Rampai, Reinders

CASE / FILE NUMBER

A20/2018

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN****Appeal****number: A20/2018****In****the Appeal between:****CAROLINE
MOKGOTHU
First Appellant
JAMES
MOKGOTHU
Second Appellant
and
THE
STATE
Respondent****CORAM:****DAFFUE, ADJP et
RAMPAL, J et
REINDERS,
J
HEARD****ON:****27 AUGUST 2018**

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 27 SEPTEMBER 2018

[1] The matter came to court by way of an appeal. The appellants were aggrieved by the conviction

- hence the appeal to have it set aside. The respondent opposed the appeal and supported the conviction. These appeal proceedings were initiated on 15 February 2018.

[2] An incident took place at 18 Louw Street, Wepener on Monday, 3

May 2010 Philemon “Joko” Motlatsi, the mayor of Naledi Municipality was gunned down. He instantly died on the scene. The fatal shooting incident took place in the evening at approximately 20h00.

[3] The shooting incident was reported to the local police. The police investigation led to the arrest of three suspects, namely:

Ms. Caroline Mokgothu, accused 1, now the first appellant;

Mr. James Mokgothu, accused 2, now the second appellant and

Mr. Senoee Khaka, accused 3.

[4] They were subsequently charged. The main charge was murder. The alternative charge was conspiracy to commit murder. They were arraigned together. Because accused 3 pleaded guilty to murder, whereas accused 2 and accused 1 pleaded not guilty, to both the main and the alternative charges, his trial was separated from theirs.

[5] The trial of the couple started in Bloemfontein on Monday, 24 January

2011. Musi JP presided. Adv. J Nel SC appeared for the defence and Adv. Bester for the prosecution. Both of the accused pleaded not guilty as already indicated. None of them gave any explanation of the plea.

[6] Notwithstanding the plea, both of them were found guilty of murder in the end. They were convicted on 4 August 2011. Three weeks later, on 25 August 2011 to be precise, accused 1 was sentenced to life imprisonment. So was her ex-husband, accused 2. As earlier indicated, the respondent supports the conviction and sentence.

[7] On 20 March 2015 the two convicted persons filed their joint application to appeal against their conviction. For reasons that are not apparent from the record, the application was finalized on 17 August 2017, some 29 months from the date it was filed. At long last they came on appeal with the leave of Van Zyl J seeing that the trial judge had retired in the meantime. Mr Nel was obviously perturbed by the inordinate delay and quite rightly so.

Such a delay is not in keeping with the norms and standards of the case flow management system. It was unfortunate that these people had to wait for so long to be heard on appeal.

[8] There were nine grounds of appeal all in all. I deem it unnecessary to enumerate them at this stage. I shall deal with them in due course when I consider the evidence relative to each of the appellants individually.

[9] The version of the respondent was narrated by the following witnesses:

- Mr. Mojalefa David Mahloko - the head of the mayor's office;
- Mr. Senooe Khaka - the mayor's killer;
- Ms. Johanna Petronella Heyneke – cellular data analyst;
- Mr. Maruping Hendrik Molise - police captain;
- Mr. S J Potlele and
- Mr. Francoise James Laux – police captain.

[10] The version of the defence was narrated by the first accused Ms. Caroline Mokgothu. – director : corporate and community services: Naledi Municipality. She called no witness. The second appellant elected to give no evidence and to call no witness.

[11] In the first place, I deal with the case as regards the second appellant, Mr. James Mokgothu. The specific grounds of his appeal were:

That the respondent did not prove his guilt beyond a reasonable doubt; that there was no prima facie case made out against him which called for an answer after the close of the prosecution case; that his decision not to challenge the poor evidence which thinly implicated him did not justify the ultimate conclusion that he was beyond a reasonable doubt guilty; that the two accomplices on whose evidence the verdict was premised, were not credible and reliable witnesses and that the evidence pertaining to cellular data would have made a significant difference to the outcome of the case against him, had the trial judge considered it instead of disregarding it as superfluous.

The testimonies of the following witnesses were applicable to him:

Mr. Mahloko; Mr. Khaka; Mr. Potlele; Ms. Heyneke; and Capt. Laux.

[12] The testimony of Mr. Mahloko was that he knew the second appellant as the husband to the first appellant. It was an undisputed fact that the second appellant and the first appellant were previously a couple. The witness did not incriminate the second appellant at all. He and the mayor got along well. He was the head of the mayor's office during the year 2010. He became a member of the mayoral committee in 2006.

[13] The evidence of the state witness 2, Mr. Khaka, heavily incriminated the second appellant. He admittedly killed the mayor. Therefore he was, first and foremost, an accomplice. Apart from being the mayor's self-confessed killer, he was a single witness.

[14] In dealing with the testimony of Mr. Khaka, two important rules of evidence had to be constantly kept in mind. The first cautionary rule applicable to the particular witness was that pertaining to the evidence of a single witness. The second cautionary rule applicable to him was that pertaining to the evidence of an accomplice.

[15] As regards the cautionary rule of evidence which applies to a single witness, the following decisions are relevant:

- R v Mokoena 1932 OPD 79 at 80
- S v Gentle 2005(1) SACR 470 (SCA)
- S v Leve 2011(1) SACR 37 (ECG) at par [8].

The court a quo was mindful that the cautionary rule as it applies to a single witness, entails that the evidence given by such a witness, must be clear and satisfactory in all material respects before the court can rely on it for a conviction of an accused person.

[16] As regards the impact of the cautionary rule of evidence applicable to an accomplice or a co-perpetrator, the following decisions are instructive:

- R v Kristusamy 1945 AD 549 at 556
- S v Mojapelo 2016 JDR 0810 (SCA) paras [17] and [19]
- S v Francis 1991(1) SACR 198 (A).

The court a quo was also mindful that the cautionary rule as it applies to an accomplice witness, entails that the evidence given by such a witness, has to be carefully scrutinized in order to guard against the possibility of false implication of an innocent person by someone

with inside information of the crime committed.

[17] The trial judge appreciated that corroborative evidence would provide the objective safeguard against the danger and risk of a possibly wrong conviction. He was very alive to the danger posed by Mr. Khaka as an accomplice. Before he embarked on the critical analysis of the witness evidence the trial judge cautioned himself. He said:

"It is apposite at this juncture to analyse and to evaluate the evidence of Mr. Khaka. In doing so, I am mindful as I said at the beginning of this judgment that he is an accomplice and I keep in mind the principles that are applicable to the treatment of the testimony of an accomplice."

[18] The critical aspects of Mr. Khaka's evidence against the second appellant may be condensed as follows: he was a foreigner. He was a citizen of Lesotho. He and Sitso were arrested at Wepener. They were convicted and they served their sentences there. He was released

before Sitso. After his release from prison he met one Sechaba. He frequented Wepener to visit his friend whom he left behind in prison. During one such visit he met Mr. Potlele through Sechaba. One day he received a call from the former. He said to him they needed to talk. He was agreeable.

- [19] The very next day he travelled from Mafeteng to Wepener to visit his jailed friend, Sitso. After the visit, he met Mr. Potlele who was with Sechaba. From there the three of them proceeded to a certain house. Later on the house turned out to be the second appellant's place of residence. There he was introduced to four people. However, the second appellant was not among them. Before the discussion started, Mr. Potlele took Sechaba away. On his return, he was informed about the plot to have the mayor killed. The conspirators asked him to eliminate the mayor on their behalf. He agreed to execute the conspirators' plot for a reward.
- [20] Sometime after the conclusion of the agreement with the conspirators, he met the second appellant at Mafeteng in Lesotho. The second appellant was with Mr. Potlele, who had arranged the meeting. Mr. Potlele introduced his companion to him as James, the second appellant. At the same time Mr. Potlele also introduced the witness to the second appellant as the assassin. The three talked about the mayor. He told them that the mayor was quite elusive; that he had been struggling for about a month to execute the plan hatched by the conspirators and that he had made two unsuccessful attempts by then.
- [21] The witness testified that the second appellant provided him with a firearm during their first meeting at Mafeteng. It was a 38 revolver. They were sitting in a car at the time. At that moment when the firearm was handed over to him, Mr. Potlele was outside the car talking to a certain lady. The second appellant was driving a red sedan. He was given to understand that the second appellant was looking for a certain "sangoma" by the name of Mohapi. Instead he took them to a different "sangoma".
- [22] The witness re-entered the country on Friday, 30 April 2010. He was not alone. His companion was a certain Seretse. They were hosted by Mr. Potlele for the night. It was decided to execute the plan on Monday 3 May 2010. The next morning, Mr. Potlele called the second appellant and informed him that they had arrived. Shortly after the telephonic conversation, the second appellant drove over, picked him and his companion up and took them to his place of residence. Now and then Mr. Potlele came to check them out during their stay. They spent the weekend in between as guests of the couple.
- [23] On Monday, 3 May 2010 the witness and his companion were still hibernating in the second appellant's house. Mr. Potlele came over during the course of the day and gave them a report. He reported to them that the mayor had gone to Dewetsdorp and that he was expected to return in the evening of the same day. It rained until sunset on that day. Acting under the cover of darkness, Mr. Khaka and Seretse stealthily walked to the mayor's house where they ambushed him. In due course the unsuspecting mayor arrived.

- [24] He immediately gunned him down. They then fled from the scene of the crime. They hastily dashed to the border. On the way back to Lesotho, the second appellant called him. About two weeks after the shooting incident, on or about 17 May 2010, he called the second appellant. They arranged that they would meet the next day for payment of the contract price.
- [25] The next day Mr. Khaka travelled from Mafeteng to Wepener. At Van Rooyen Border Gate he took a taxi to town. The second appellant met him at a certain road intersection on the outskirts of the town. From there he took him to his place of residence. The second appellant paid him R8000. He identified the residential property as depicted on photograph 1 “exi a” as the second appellant’s -house.
- [26] From there the two men drove together to a bank where the second appellant paid him a further amount of R2000. He identified the scene as depicted on photograph 2 “exi a” as the bank where the second appellant withdrew the additional amount of money. After his arrest he pointed out those two scenes of payment to Capt. Laux.
- [27] Ms. JP Heyneke testified against the second appellant. In a nutshell, her evidence was that there was cellular contact between the second appellant’s cellular phone 072 844 6469 and the user of a cellular phone 078 092
3674. Before the shooting incident on 3 May 2010 there was cellular contact between the two cellular phones. After the shooting incident there was again cellular contact between those two cellular phones. All in all there were 47 calls made between the two cellular phone users. Those calls were made between 30 April 2010 and 7 May 2010, For precise details of such cellular data – see “exi d” at pp 37 and 38 Volume 5 of the record.
- [28] Mr. SJ Potlele, the state witness 3, also testified against the second appellant. The gist of his evidence was that he travelled to Mafeteng in Lesotho on one occasion with the second appellant; that they met the state witness 2, Mr. Khaka there; that the second appellant and Mr. Khaka had some discussion; that he did not see the second appellant handing a firearm to Mr. Khaka; that there was no discussion concerning the conspiratorial plot and that the meeting took place before the shooting incident.
- [29] He testified further that on Friday, 30 April 2010 Mr. Khaka and his companion, a certain Seretse, arrived at Wepener. He provided them with overnight accommodation. The next day, on Saturday, 1 May 2010, the second appellant drove to his house and took the two foreign visitors to his place of residence. He never had any further dealings with the two foreigners afterwards.
- [30] Capt. FJ Laux, state witness 6, testified that he interviewed the suspect in Bloemfontein on 30 May
2010. The personal particulars of the suspect were noted as follows:

His name was noted as Senowe (sic) Khaka, his residential address as Mafeteng in Lesotho, his cell phone 0780923674, his date of birth as 25 December 1981, his level of education as standard six, his marital status as single, his gender as male, and his occupation as unemployed shepherd/vendor.

Among others, the suspect stated, in his warning statement, - that the second appellant hosted him and his friend Seretse for two consecutive nights preceding the shooting incident and that the second appellant rewarded him after the shooting incident.

See the warning statement “exi b” page 16 Volume 5.

[31] At the close or end of the prosecution’s case, the second appellant unsuccessfully applied in terms of section 174 for his discharge. Notwithstanding the refusal of the court a quo to discharge him midway, he chose to close his case without testifying or calling any witnesses to do so on his behalf.

[32] The trial judge ultimately returned the verdict that accused 2, now the second appellant, was guilty of murder.

[33] About the decision of the second appellant to give no evidence, the court a quo had this to say:

“Regarding accused 2, there was a prima facie case against him at the close of the state case. There was a case for him to answer or at least to rebut the evidence that implicated him in the crime, but accused 2 opted to exercise his right to silence as the Constitution accords him and of course he is entitled to exercise that constitutional right to keep quiet, but there are consequences following upon that type of choice....”

[34] The crucial question on appeal was whether, at the end of the prosecution’s case, there was a prima facie case which called for accused 2 to answer or not.

[35] Mr. Nel, counsel for the appellants, argued that the evidence of the two accomplices, namely: Mr.Senoee Khaka and Mr. Sabata J Potlele, was riddled with many fatally unsatisfactory features. Among others, counsel contended that the former’s evidence was tainted by material internal contradictions, external contradictions, inconsistencies as to whether he ever received a firearm from Seretse or not, deviations from his police warning statement; the contradictions between his testimony and the witness statement by a certain Sechaba and Mr. Khaka’s inability to provide an acceptable explanation for such multitude of contradictions.

[36] On the strength of the above argument and contentions, counsel submitted there was no prima facie case the second appellant had to answer at the close of the prosecution’s case. He submitted that the court a quo materially erred in concluding otherwise. He therefore, implored us to uphold the appeal, to reverse the ruling made by the court a quo and to decide that the second appellant’s application in terms of section 174 ought to have succeeded.

[37] Mr. Botha, counsel for the respondent, argued that a prima facie case was made out against the second appellant; that he failed to meet that case and that the uncontested evidence against him became conclusive when he failed to refute such highly incriminating evidence against him. Therefore, counsel submitted that the court a quo committed no misdirection in refusing to discharge the second appellant in terms of section 174; that there was a very strong prima facie case against him and that his failure to refute such a case was telling against his alleged innocence. Accordingly, counsel urged

us to dismiss the second appellant's appeal and to confirm his conviction.

[38] In the first place, I propose to deal with the evidence concerning cellular data. Although this point was never an issue at the trial, it was seriously raised on appeal. The gist of the second appellant's contention boiled down to the contention that the evidence of the state witness 2, Mr. Senooe Khaka, to the effect that he had regular cellular contact with the second appellant was not reasonably reliable because his correct cell phone 0780926374 appeared nowhere in "exi d" where Ms. Heyneke analysed the cellular activities of the second appellant as would fully appear on pages 37 and 38 volume 5.

[39] The second appellant's belated argument has its fons et origio in the following exchange between Ms. Bester, and the first prosecution witness, Mr. Senooe Khaka:

"U het vroeër getuig en gesê dat Potlele vir u gekontak het, is dit reg, telefonies? --- Ja, die person wat my elke slag gebel het. Daar is ooreengekom dat hy die person is wat my sal bel en die person is Potlele.

Kan u onthou wat was u telefoonnommer wat gebruik is? --- Ja.

Wat was daardie nommer? --- 078 092 6374."

(my own emphasis)

[40] The third prosecution witness, Ms. JP Heyneke, the forensic liaison manager at Vodacom Group Limited, testified that she was subpoenaed in terms of section 205 Act No. 51/1977 to provide cellular information pertaining to the mobile subscriber integrated services digital network of the sim card +27728446469 between 30 April 2010 and 6 May 2010.

[41] On appeal, the second appellant desperately tried to persuade us to reject the evidence of Mr. Senooe Khaka as false on grounds that he could not have had the alleged regular contact with the second appellant because cell phone +27780923674 did not belong to him and that the second appellant did not have any cellular contact at the relevant time with cell phone +27780926374 which admittedly belonged to Mr. Senooe Khaka.

- [42] The discrepancy between the two cellular numbers concerned is limited to the third and fourth digits 3674 and 6374. In his evidence Mr. Senooe Khaka said the latter was his cell phone number. However, perusal of his warning statement shows that the former, 3674, tallies with the cell phone number he gave to Capt. Laux. It was the former 3674 and not the latter 6374 which was shown to have had regular contact with the second appellant's cellular number + 27728446469.
- [43] It is important to note that Mr. Senooe Khaka mentioned the former3674 to the investigating officer, Capt. Laux, as his cell phone number. It is also important to appreciate that he gave that number to the Captain no more than four weeks after the shooting (vide "exi b" page 20 volume 5). Whereas he told the investigating officer about3674 on 30 May 2010, being the date of his arrest, he testified on 24 January 2011, approximately thirty three weeks after the shooting incident (vide 37 record especially p46 Vol 1)
- [44] In the light of all this, it was more probable than not, in my view, that he did not use his cell phone again during the period of his incarceration. As a result thereof, his memory as regards the correct number of his cell phone might have gradually faded with the passage of time. If, we accept, and think we should, that the cellular number noted by Capt. Laux was the correct cellular number of Mr. Senooe Khaka, then the entire argument of the second appellant, raised for the first time on appeal, falls to be rejected. It is clear and obvious that the witness shifted the third last digit, in other words the 6, backwards to the fourth last slot. Similarly he also shifted the fourth last digit, in other words the 3, forward to the third last slot. All this swapping of the two digits concerned, seems to have been a patent but innocent mistake in the testimony of the witness. If the two digits are swapped around, then the number which the witness gave in court is exactly the same as 078 092 3674 which is the number he gave to Capt. Laux and which number had regular contact with the second appellant's cell phone as analysed by Ms. Heyneke. It would seem to me that this is a classic case where the exercise of caution should not be allowed to displace the exercise of common sense. In the light of this I am not persuaded by the submission that correct consideration of the cellular data by the court a quo would have led to a different verdict favourable to the second appellant.
- [45] In the second place, I proceed to consider the evidence pertaining to the firearm. In his direct evidence, Mr. Senooe Khaka testified that he made two abortive attempts to shoot the mayor before he met the second appellant. He stated that on every one of those occasions, he was armed with a firearm belonging to his friend, Seretse. In his indirect evidence, however, he sang a different tune. He answered that he never received any firearm from the said gentleman. To that extent his direct evidence was false.
- [46] Notwithstanding such internal contradictions, he was steadfast in his assertions that the second appellant armed him with a .38 revolver or a flywheel as he described it; that it was that firearm he used to kill the mayor, but that the second appellant did not provide him

with ammunition. In the light of this, I think nothing much turns on the contradiction relied upon. It must be borne in mind that he produced the murder weapon to the police. He told the police that the second appellant supplied the murder weapon. Yet the second appellant saw it fit not to refute such a serious allegation.

- [47] As regards the murder weapon he stood firm. The second appellant and not Seretse provided him with the murder weapon, his evidence that Mr. Potlele did not witness the handing over of the murder weapon at Mafeteng and his evidence that the second appellant did not provide him with ammunition tended to indicate that he was not given to exaggerate the case against the second appellant. A vindictive and untruthful witness would probably have testified that the second appellant had armed him with a fully loaded firearm. In my view, this point alone enhanced the trustworthiness of the witness' version against the second appellant, a man who had not paid him in full the agreed contract price to kill.
- [48] In the third place, the witness was confronted with a certain Sechaba's version. Seemingly Sechaba had stated in his witness statement that Mr. Senooe Khaka was already seen in possession of the flywheel firearm at Wepener as far back as February 2010 long before he met the second appellant at Mafeteng. The witness denied the allegations. I hasten to remark that Sechaba did not testify for the state. Therefore, there could have been no contradiction between his untested allegations and the witness evidence given on oath and thoroughly tested by way of cross examination. Since Sechaba did not testify, the allegations contained in his written statement, was of no evidential value. No weight whatsoever could be attached to his version in order to criticize, let alone to discredit the witness. It follows, as a matter of logic, that wherever there was a discord between the two, the version of the witness had to prevail.
- [49] The essential features of the evidence given by Mr. Senooe Khaka against the second appellant can be condensed as follows: he first met him at Mafeteng. He was accompanied by Mr. Sabata Potlele, who was designated by the conspirators as Mr. Senooe Khaka's handler. Mr. Potlele introduced Mr. Khaka to the second appellant as the assassin. The second appellant seemingly understood what Mr. Khaka's mandate entailed seeing that he asked no questions about his description as an assassin. Instead he provided the assassin with the lethal weapon. By so doing, the second appellant actively associated himself with the decision of the conspirators to kill the mayor. The assassin subsequently travelled to Wepener closer to the identified target. He was harboured by his handler, Mr. Potlele, for one night. He was then shifted to the second appellant who harboured him for two more days prior to the execution of the murder plot.
- [50] In haste and in stealth, he took to flight after the shooting incident. On his way back to the border, Mr. Senooe Khaka received a few calls from the second appellant. Miss Heyneke's call data analysis revealed that in the evening of the murder, in other words the 3rd May 2010, the second appellant called the witness or the mayor's killer:

· At 18:50:38

· At 18:51:12

· At 18:52:40

· At 19:39:17

[51] The next morning, on Tuesday, 4th May 2010, the second appellant again called the mayor's killer. The call data analysis revealed that the following cellular contact was established and that the timelines were as follows:

· At 00:09:10

· At 00:35:36 69 seconds

· At 00:44:08 10 seconds

· At 00:44:37 89 seconds

[52] About two weeks later the killer re-entered the country. The second appellant met him on the way, took him out of the taxi and took him to his place of residence at 20 Spies Street, Wepener where he initially paid the assassin R8000

- see photograph 1 "exi a". From there the second appellant took the assassin to the First National Bank where he subsequently paid the assassin an additional amount of R2000 – see photograph 2 "exi a".

[53] Mr. Senooe Khaka was severely criticized by the defence counsel, Mr. Nel. A number of unfavourable aspects of his evidence were enumerated during the hearing of the appeal. It will serve no useful purpose to repeat them here. I have considered them all. Notwithstanding such shortcomings, I am not persuaded that the court a quo committed any materially appealable misdirection in finding the second appellant guilty. It must be stressed that the allegation that the second appellant met with the would-be assassin and the allegation that he subsequently harboured the would-be assassin for two days before the mayor was shot dead were corroborated by Mr. Sabata Potlele.

[54] Given the gravity of the damning averments made by Mr. Senooe Khaka against him, one would not have expected an innocent person so highly incriminated to remain silent. Yet that is precisely what the second appellant elected to do. The prosecution presented, in my view, very strong evidence against the second appellant. Such evidence required a response - S v Thebus 2003 (3) SA 505 (CC). The second appellant did not rise up to meet the evidential challenge. He was obliged by the monumental magnitude of the incriminating evidence to explain, among others, why he made those several calls to the assassin at extremely awkward hours of the night after the shooting incident.

[55] Indeed Mr. Senooe Khaka was a single witness as regards the provision of the murder weapon, the first meeting after the mayor's execution and the payment of the contract price. I am not persuaded by the submission that his evidence was not clear and satisfactory in every material respects as far as those aspects of his evidence are concerned. On the

contrary, I am persuaded by the submission that the evidence of the two accomplices in all its essential features, had a ring of truth to justify the verdict pronounced by the court a quo in respect of the second appellant, I am satisfied that the respondent had proved the guilt of the second appellant beyond reasonable doubt. Therefore, I am of the view that his appeal cannot succeed on any of the grounds set out above. The quality of the unchallenged evidence and the weight attached to it by the court a quo as regards the discharge application and the verdict, are findings which, on appeal, I cannot disturb. I am, therefore, inclined to dismiss the second appellant's appeal and to confirm his conviction.

[56] In the second place, I deal with the case as regard the first appellant, Ms. Caroline Mokgothu. The testimonies of the following four witnesses were applicable to her:

Mr. Mahloko, Mr. Khaka, Mr. Potlele and Captain Modise, to a lesser extent.

[57] The first appellant's exclusive grounds of appeal were that her version was reasonably true; that the court erred in rejecting her version despite the trial judge's favourable finding that, as a witness, she was not discredited; that the court a quo erred in finding that Mr. Mahloko was a credible and reliable witness; that the court a quo erred in finding that Mr. Khaka was a credible and reliable witness in spite of the multiplicity of his material contradictions that blemished his testimony; that the court a quo erred in exonerating the respondent from the obligation of calling all the known and available witnesses to corroborate the evidence of Mr. Potlele, about the alleged conspiracy to kill the victim and that the court a quo erred in finding that Mr. Potlele's evidence was not entirely untrustworthy and unreliable.

[58] The testimony of Mr. Mahloko was that the victim, Philemon Motlatsi was the mayor of Naledi Municipality; that the first appellant was the director: corporate and community services: Naledi Municipality; that by the end of the year 2009, the first appellant and the mayor did not see eye to eye; that Mr. Potlele and the mayor were not in good terms by the end of the year 2009; that the first appellant and Mr. Potlele were very close; that Mr. Potlele was awarded a municipal tender thanks to the first appellant; that Mr. Potlele was also an employee of the same municipality but was dismissed and that on one occasion a certain Potsotso had publicly threatened to kill the mayor and that the threat was made at a public meeting held at Dewetsdorp.

[59] The court a quo found that Mr. Mahloko was a confidante of the victim; that in spite of that, he was not hostile to the first appellant and that he was an honest witness. I am not persuaded that the court a quo erred in doing so. The essence of the witness' evidence was that the first appellant had a motive to harm the mayor. The evidence of Mr. Mahloko was that she despised the mayor's authority; that she often acted in cahoots with her immediate supervisor, the municipal manager and that at the time of the incident she was irregularly acting as the municipal manager appointed by her

supervisor instead of the municipal council chaired by the mayor. Things like these seriously strained the relationship between the first appellant and the mayor according to the witness.

[60] The evidence of state witness 2, Mr. Senoee Khaka, heavily implicated the first appellant. What I have earlier said about him in connection with the second appellant applies equally well to the first appellant.

[61] The essential features of his evidence against the first appellant may be summarized as follows:

That at Mr. Potlele's request he travelled from Mafeteng to Wepener; that with Potlele and a certain Sechaba, he proceeded to a certain house; that there Mr. Potlele introduced him to four persons; that among them was the first appellant; she was the lady of the house; that besides her, Ms. Motaung, a lady by the name of Nonkosi and a gentleman by the name of the Willem were also present in the house.

[62] He testified that Sechaba was taken away before the deliberations started. Mr. Potlele initiated the deliberations. He said to Mr. Khaka:

"Hier is n person wat ons pla, die person wil ons doodmaak"

Thereupon the first appellant added:

"...voordat die person vir ons doodmaak, wil ons eers vir hom dood hê."

[63] The first appellant then told the witness that they wanted him to shoot the troublesome person; that the alleged troublemaker was "Joko", in other words the mayor and that they were prepared to pay him any amount he wanted. Although they offered R70,000 he told them that R60,000 would do. It was decided that Mr. Potlele would show him the mayor's house and that Potlele would act as his handler and as a kind of an intermediary between him as the hired hitmen and the conspirators. The meeting in question was held during February 2010. After the deal had been clinched between him and the conspirators he returned to Lesotho.

[64] He added that on Saturday 1st May 2010 the first appellant's husband fetched him and Seretse from Mr. Potlele's house. They spent two nights and three days in the first appellant's house. They were on a deadly mission to execute the murder plot in accordance with the agreement he concluded with the conspirators. During that period, they were harboured by the first appellant acting in collaboration with her husband, the second appellant.

[65] He testified further that he executed the mayor on Monday, 3rd May 2010. Mr. Khaka and Seretse fled the country the very same night. About two weeks later, on or about 17th May 2010, Mr. Khaka received a call from the first appellant's husband. An appointment was made for the payment of the contract price. The next day the assassin arrived at Wepener. The first appellant's husband took him home where the initial amount of R8000 was paid for the execution of the conspiratorial plot. The payment by the second appellant was witnessed by the first appellant.

- [66] From the first appellant's house, her husband drove to the First National Bank with Mr. Senooe Khaka where an additional amount of R2000 was paid. After his arrest, Mr. Senooe Khaka pointed out the house of the first appellant to the police - see photograph 1 "exi a". By then he had already surrendered the murder weapon, a .38 revolver to the police. His warning statement dated 30th May 2010 was handed up as "exi b".
- [67] In certain respects Mr. Senooe Khaka was a single witness. He was also an accomplice. On account of these two features, the court a quo was required to be doubly cautious in dealing with his evidence. The judgment shows that the trial court was alert and alive to those two rules of caution.
- [68] The same can be said about Mr. Sabata Potlele. He too was a single witness in certain respects. He too was an accomplice. The difference between these two accomplices, Mr. Potlele and Mr. Khaka, was this: the latter admittedly shot and killed the mayor. The former facilitated the shooting and killing process but did not actually deliver the actus reus.

CR Snyman: Strafreg: sixth edition page 270

S v Radloff 1978(4) SA 66(A) at 74.

- [69] The danger of Mr. Senooe Khaka falsely incriminating the first appellant was substantially dismissed by virtue of the following contradictions:

- he did not know the first appellant in pretty much the same way as he did not know her husband, the second appellant, before the conspirators' meeting which he attended;
- he was an unsophisticated rural man and a shepherd from Ha-Mapasa, a village in the Mafeteng district;
- he had virtually no motive to falsely implicate the first or the second appellant;
- his testimony was materially corroborated by the first prosecution witness, Mr. Mahloko as far as motive was concerned;
- his testimony as far as two of his visits to the first appellant's house were concerned, was materially corroborated by the fourth prosecution witness, Mr. Potlele, a close ally of the first appellant;
- the credibility and reliability of his testimony was significantly and materially enhanced by the objective cellular evidence presented by Ms. Heyneke against the second appellant, the first appellant's soulmate;

These considerations indeed go a long way towards reducing the danger of convicting an innocent person(s) on the evidence of an accomplice.

S v Mashumpa & another 2008(1) SACR 126(E) par [42] and further;

In my view the first appellant's bare denial was no answer, let alone an adequate answer, to the highly incriminating evidence given against her not only by the assassin, but also by her very close ally, Mr. Potlele.

[70] In view of Mr. Senoee Khaka's poor level of education coupled with his modest socio-economic background he would probably not have been able to fabricate such detailed evidence against the first appellant or the second appellant or both. Moreover, for the same reasons, he would probably not have been able to withstand the prolonged and extensive cross examination by a seasoned senior counsel the way he did. The probabilities strongly militate against the acceptance of the first appellant's

version and the corresponding repudiation of the assassin's version.

[71] The silence of the second appellant has a bearing on the first appellant's bare denial. It validated the evidence of the assassin, not only against the second appellant, but also against the first appellant.

[72] Mr. Potlele was an ambivalent witness. He was one of the leading conspirators. He together, with the appellant's and others, plotted the elimination of the mayor. In the past he was awarded the tender contract by the Naledi Municipality. It would seem that the first appellant was instrumental to the decision. According to the first witness, Mahloko, Mr. Potlele and the first appellant were good friends. As a good friend, Mr. Potlele had absolutely no reason to implicate his friend as he did. It must therefore be accepted that the evidence he gave against the first appellant was substantially true.

[73] But it was the same Mr. Potlele who spilled the beans about this crime. Realizing that he was as guilty as the appellants, he rushed to the police to protect his back. He made two affidavits about the crime - one on 13 May 2010 and another on 23 May 2010. He implicated his friends, the appellants in order to protect himself. He was not charged.

[74] At the trial, he was called as a prosecution witness. He found it hard to incriminate the appellants. I gained the impression that he deliberately contradicted Mr. Senoee Khaka in a bid to frustrate the prosecution case against his friends. For instance, he tried to exonerate them by suggesting that Mr. Senoee Khaka was indebted to the mayor and that Mr. Senoee Khaka, and not the first appellant, mooted out the idea that the mayor had to be killed.

[75] In the light of the fact that Mr. Potlele testified with a forked tongue, the court a quo correctly decided to reject his evidence wherever it deflected from that of his fellow accomplice, Mr. Senoee Khaka. The alleged contradictions of Mr. Khaka by Mr. Potlele were, in my view artificial and not genuine. They were deliberate and designed to weaken the prosecution case for the benefit of the appellants with whom Mr. Potlele could have been in the dock.

[76] It is important to keep in mind that Mr. Potlele made his last statement on 23rd May 2010. At that time Mr. Khaka was still at large. He made his statement on 30th May 2010. Therefore, there was no room for them to compare notes, or to conspire against the appellants. They had no opportunity of ensuring that their statements were substantially consistent.

S v Ishmael & Others

(2) 1965(1) SA 452 (N) at 456 A-B.

[77] In the instant matter, there were in fact differences in the statements of the two accomplices as well as their testimonies. Mr. Khaka testified that the second appellant provided him with a firearm. However, Mr. Potlele knew nothing about it. Similarly Mr. Potlele testified that the appellants went to Lesotho together. However Mr. Khaka knew nothing about it. Mr. Khaka testified about the payments. However, Mr. Potlele did not have personal knowledge thereof. If there was a conspiracy between the two accomplices to falsely incriminate the appellants, one would not have expected gaps such as those to have existed at all either in their statements or their testimonies.

[78] The salient principle is that the evidence of an accomplice need not be wholly consistent or wholly reliable or even wholly truthful. The trial court must only be satisfied that, in essence, the story told by an accomplice, all its blemishes notwithstanding, is beyond a reasonable doubt true – S v Francis 1991 (1) SACR 198 (A); S v Engelbrecht 2011 (2) SACR 540 (SCA).

The court a quo cautiously considered the evidence of the accomplices. The trial judge was ultimately persuaded to accept Mr. Khaka's evidence

on the strength of its cogency. The trial judge then concluded that his cogent evidence had a ring of truth about it. S v Mafaladiso & Another 2003 (1) SACR 583 (SCA). With that conclusion, I am in respectful agreement.

[79] It is so that the respondent did not call the known and available witnesses such as Ms. Motaung, Nonkosi and Willem. I intend no disrespect in using their first names. I could not ascertain their surnames from the record. Mr. Nel submitted that the court a quo should have drawn a negative inference from the respondent's failure to call those three alleged conspirators. Mr. Botha

disagreed.

[80] It is an established custom or rule of practice that the defence is at liberty to call any listed but unused prosecution witness if the defence is of the opinion that such prosecution witness could assist in the advancement of the defence case. Therefore, it was open to the defence in this instance to have called any of those witnesses. However, it was not done. In an attempt to explain the omission by the defence, counsel contended that those witnesses were not expressly offered to the defence by the prosecution.

- [81] The argument by counsel for the defence holds no water. In the first place the appellant's were legally represented in the court a quo. In the second place they were not represented by a novice, but rather by a highly experienced counsel - a senior counsel at that. The same argument was raised in the court a quo. The trial judge commented that the defence could, on its own accord, have easily called those witnesses. At that stage, the door was still open. It was still possible to have the defence case reopened in order to call those witnesses. Yet again the defence did not follow that remedial avenue. In my view the appellants have themselves to blame for the failure to call those witnesses. They are now precluded from contending that a negative inference be drawn from the respondent's failure to do so. It does not lie in the mouths of the appellants to cry foul play now. *R v Heilbron* 1922 TPD 99; *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) par [11].
- [82] At the end of it all, the court a quo made certain further findings against the appellants. On the facts such findings were justified.
- [83] It was submitted on behalf of the appellants that, at worst for them, the court a quo should have convicted them on the basis of the alternative charge, namely: conspiracy to murder and not the main charge, murder.

The argument was fallacious. The conspirators plotted to have the mayor killed. The mayor was ultimately killed. The purpose of the conspiracy was therefore attained. Since murder was an accomplished fact the verdict based on the accomplished fact was correct. It has been held that the heart and soul of a charge sheet is that it has to inform an accused of the case the state wants to advance against him or her. *S v Hugo* 1976 (4) SA 536 (A).

- [84] The appellants contended that the charge of murder was not properly formulated in that they were referred to as perpetrators and not accomplices. In my view it was of no moment whether the appellants were described as perpetrators or as accomplices in the indictment. The underlying consideration is that when the assassin shot the mayor he was a mere instrument of the appellants. He did what he did for and on their behalf. Consequently it made no difference legally whether they were referred to as accomplices or perpetrators. The fact of the matter is that they perpetrated the crime of murder and that the actual killer was an extension of themselves in the eyes of the law. In the light of this the submission that the appellants should have been convicted for conspiracy in terms of section 18(2)(a) Act No. 17 of 1956 holds no water.
- [85] There remains one more aspect of the argument to consider. The appellants contended that the court a quo erred in finding that they killed the mayor. In developing this argument further Mr. Nel submitted that the mayor had many enemies and that any one of them other than the appellants could have been responsible for his murder. He specifically reminded us on appeal that a character by the name of Potsotso had publically threatened to kill the mayor. The argument failed to impress me. The real assassin, Mr. Senooe Khaka did not know Potsotso. It is highly improbable, therefore, that he would have stepped forward and admitted killing the mayor if the mayor had been killed by Potsotso. He firmly asserted that

he was an appointed agent of the appellants and not Potsotso or anyone else for that matter. It is equally improbable that the assassin would protect the real culprit at the expense of completely innocent people. I am convinced that the appellants together with their fellow conspirators, and not Potsotso or anybody else, masterminded the killing of the mayor. What was required was certainty beyond reasonable doubt that the appellants were guilty. And that was clearly established.

[86] As I see it, the respondent presented a very strong case against the first appellant as well. I am not persuaded that the first appellant's appeal can be upheld on any of the grounds she relied upon or any other grounds whatsoever. In the absence of any proven, material and appealable misdirection, we, sitting as we are in an appellate mode, are not at liberty to interfere. I would, therefore, also dismiss the first appellant's appeal, and confirm her conviction.

[87] In the result I make the following order:

87.1 The appeal of each of the appellants is dismissed;

87.2 The conviction in respect of each of them is confirmed;

87.3 The sentence of life imprisonment imposed on each of them stands.

MH RAMPAI, J

I concur,

DAFFUE, ADJP

REINDERS, J

On behalf of appellant: Adv. J Nel SC

Instructed by:

Fixane Attorneys

Bloemfontein

On behalf of respondent: Adv. JP Botha

Instructed by:

Director: Public Prosecutions

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